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Supreme Court of the United States

904

No. ....., October Term, 1970

DUNCAN E. McPHERSON,

Petitioner,

vs.

MANNING WALKER, JOHN M. PETERS, PETER J. PETERS, PAUL H. SULLHOFF, WINFRED A. PHILLIPS, GRACE G. PHILLIPS, and WINFRED A. PHILLIPS, d/b/a WINN PHILLIPS AGENCY,

WILLIAM HANSON, Judge of the District Court, and JUDGES COSTENHOUT, MATTHES and GIBSON of the Court of Appeals,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS AND TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, WESTERN DIVISION

DUNCAN E. McPHERSON,
Petitioner Pro Se.

COCKLE PRINTING CO., 1032 St. Mary's Ave., Omaha

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IN THE
SUPREME COURT OF THE UNITED STATES

No._____, October Term, 1970

DUNCAN E. McPHERSON,
Petitioner,

vs.

MANNING WALKER, JOHN M. PETERS, PETER J. PETERS, PAUL H. SULLHOFF, WINFRED A. PHILLIPS, GRACE G. PHILLIPS, and WINFRED A. PHILLIPS, d/b/a WINN PHILLIPS AGENCY,

---

WILLIAM HANSON, Judge of the District Court, and JUDGES OOSTERHOUT, MATTHES and GIBSON of the Court of Appeals,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS AND TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, WESTERN DIVISION

Duncan E. McPherson,
Petitioner Pro Se.

Petitioner prays that a writ of certiorari issue to review the judgments of the United States District Court for the Southern District of Iowa, Western Division and the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on June 30, 1970.

Opinion Below

The memorandum opinion of the District Court Judge William Hanson appears in the Appendix. The opinion of the Eighth Circuit Courts of Appeals, Judges Oosterhout, Matthes and Gibson, appears in the Appendix.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 30, 1970. An application of extension of time was granted by this Court on September 21, 1970, ordering an extension to and including October 28, 1970. The jurisdiction of this Court is invoked under the provisions of the constitution and 28 USC Section 1253, 1254 and 28 USC Section 1651.

Questions Presented

Where some parties to an action at law are friends, associates, and officers of the courts rendering judgments, may these courts render judgments in the benefit of these friends by holding that the lawyer, M. Walker, had authority to sign a release (which released fraud) when in the release contract M. Walker represented that a power of attorney gave him this authority, even though this power gave no such authority. Further, may it be held and reaffirmed that the release was ratified by the plaintiff petitioner by his conduct, when

the District Judge sustained during discovery procedure that the lawyer defendant, M. Walker, on his objection to the interrogatory did not have to answer petitioner's question on what this ratification conduct was as this was "a legal opinion", thereby effectively quashing the petitioner's facts on this issue.

May these judges then disregard the law that a fiduciary or attorney can't claim ratification of the attorney's acts between himself and client, where he devises the purported acts.

Where there are such rulings on fact in these circumstances which would ordinarily preclude review, and where there is an avoidance of proper issues of law is this conduct reasonably substantial evidence that a basic prejudice exists for and in behalf of the defendant, M. Walker, a fellow lawyer and officer of these courts, and against the opposing party, the petitioner.

Law Involved

The fundamental principles of common law. The constitutional protection for an impartial trial and due process of the law in the 14th Amendment.

Statement of the Case

The diversity of citizenship was the basis for federal jurisdiction.

Contracts were entered into between Phillips, a local realtor, city council member, candidate for Mayor of Council Bluffs, Iowa, and the petitioner in June of 1965 whereby Phillips conveyed his interest in

real estate for $15,000, and agreed to repurchase same on December 7, 1965 for $16,500, six months later.

Petitioner was to pay interest on his bank loan (to fund the purchase), legal fees and appraisal fees and personal expenses. Petitioner's bankers and attorney were to approve the transaction, which they did. Phillips was to have all the net income on these properties for the six months, whether or not this exceeded $1,500. In effect, these properties were rented back to Phillips for $1,500 to be paid on repurchase.

The Eighth Circuit held this was a loan because the defendants argued it should be made into an unlawful loan and thereby make me guilty of usury. Additionally, this was to legalize Mr. Phillip's embezzlement of rent by his not paying on the contracts.

Phillips was to sell all properties during the six months and I would assign the property interest minus expenses, including commissions to Phillips, until I received $16,500, whereupon I would assign the remaining property equities back to Phillips who represented they were worth about $60,000, that I had nothing to worry about, and that this would save him from bankruptcy. They were, in fact, worth less than $250.00* and, of course, he didn't even try to sell any properties.

Petitioner discovered two months after purchase that one property assignment (the most valuable assignment) was not convayed to petitioner's attorney, Mr. Ford, when Phillips got the money from this attorney in exchange for the assignments, an honest mistake by petitioner's attorney, Mr. Ford. Petitioner spent several weeks trying to settle with Mr. McGinn, attorney

for Phillips, on the coming breach of contract, to no avail. Petitioner was served on or about November 30, 1965 by an embarrassed process server giving notice of forfeiture on petitioner's assigned contract interest by the title holder of this property, one Richard Porter, former attorney for and schoolboy friend of W. Phillips, showing Phillips was not paying on this contract to Porter even though he was collecting the rent on this property. The same thing happened a few nights later to another property where title belonged to Mr. Porter. Forfeiture happened 30 days later. The process server said, "I don't know about this Winn Phillips". He seemed despondent and I tried to cheer him up by telling him I had hired Mr. Walker the week before. I liked the process server; he understood what was going on about Phillips. I didn't tell him that serving me in Omaha from a court in Iowa was not (in my opinion) legal service; I thought this might make him more despondent. Several other properties were not being paid on by Mr. Phillips.

Judge Hanson said in his memorandum (page 13, line 15) "... During the six-month period Phillips continued to make and receive payments relating to these properties....". These forfeiture notices were in evidence, in addition to a letter showing Mr. Phillips was not paying $350 per month on his office.

Mr. Walker was hired about November 21, 1965, perjuriously disputed by Mr. Walker and Mr. P. Peters who claim it was December 13, 1965. Warranty Deeds were recorded, dated December 10, 1965, by Mr. Walker where Walker as (attorney in fact) was deeded title to the same property (already assigned) from Mr. Phillips where Phillips did not have title to this property, and the power of attorney was not executed until later.

Referring to this evidence Judge Hanson said, "There is evidence to show that Walker felt it necessary to clarify title to the properties and provide legal authority for exercise of control by the plaintiff". (page 14, line 3). The human mind has an infinite capacity to believe as it wants to believe in the first place.

Mr. Walker was requested by the petitioner to have Mr. Phillips evicted immediately (he wouldn't leave voluntarily) from his office, one of the assigned properties, so that he wouldn't claim ratification and retention of the benefits by petitioner. I was concerned about abuse of the standard ratification defense I thought Phillips would try to use in the coming law suit. Mr. Walker told me not to worry about "ratification", and Phillips could not discharge this fraud in bankruptcy. This was not in evidence because of Judge Hanson's ruling avoiding the issue.

Mr. Walker, a friend of the Attorney General of Iowa, signed this release four days before the petitioner returned from Florida because Mr. Walker knew the plaintiff would not sign this release instrument. No reason was given by Mr. Walker why the principals were not asked to sign.

The purported release contract provides "... that they (Mr. and Mrs. McPherson) are executing this release solely in reliance upon their own knowledge, belief and judgment, and not upon any representations made by any parties released or others in their behalf.. ..".

Neither the petitioner or Mrs. McPherson had ever seen this release before its execution by Mr. Walker.

The acknowledgment says "...personally appeared Manning Walker, to me known to be the person named in and who executed the foregoing instrument, and acknowledged that he executed the same as the voluntary act and deed of his principals....".

The undisputed evidence at trial showed that Mrs. McPherson was never informed of this release although she was in Omaha, Nebraska all this time and could be reached by telephone and, therefore, couldn't possibly be her voluntary act and deed.

During discovery the petitioner alleged that this release was a prima facie fraud. Judge Hanson admonished the petitioner in a written ruling that "intemperate accusations (by the plaintiff) would not be tolerated". I assume he was referring to the above allegation.

I don't want to bore the court with a long list of complaints but the law firm of Hess Peters Sulhoff and Walker maliciously engineered two additional law suits in Iowa concerned with these properties against the petitioner after petitioner filed his suit against the listed members of this firm.

I removed one suit to Federal Court; Judge Hanson remanded it back to the State Court. Although I was never lawfully served, a State Court judment was entered against me for some $12,000 on a purported 1st mortgage on the office property even though I had never signed any obligation for this mortgage, nor had Mr. Walker. There was a hidden 1st mortgage recorded but not in the abstract previous to this "so called" 1st mortgage, that judgment was rendered upon. This suit was brought by Douglas Peters, attorney in this law firm.

There were many other acts by the court during discovery and trial prejudicial to my case, denial of a motion for a continuance and other motions; evidence was withheld by the defense. Motions for default judgments for not producing all the evidence, which was indisputable, were denied. It was an unfair proceeding. Furthermore, the testimony in the record is incomplete; a question by Judge Hanson asking Mrs. McPherson when she signed the first power of attorney is missing along with her answer. A discovery answer by Mr. Walker stated another missing power was executed previously. This discovery answer was partly perjurous, and the judge was trying to clear up the mystery. Mr. Walker's discovery answer was inconsistent with the testimony of only one execution on a later changed power of attorney over our signatures, as Mrs. McPherson was only in Mr. Walker's office once. A question by Mr. Tinley about divorce to Mrs. McPherson and her answer is also missing from the record. Evidentally the record on Mr. Tinley's dirt research was suppressed on second thought.

Judge Hanson said (Page 15, lines 10-14) "...the testimony of Phillip's attorney....". Phillip's attorney did not testify at the trial.

* Mr. Tinley, one of the attorneys for Mr. Walker, objected to the judicially purported $16,500 worth of property being put up for an Appeal Bond on the grounds this property was not worth $250 and other reasons. This objection was sustained by the District Court. Judge Hanson held (p 13, line 8 from bottom)"... amount of the equities obtained by the plaintiff appear to have been well in excess of $16,500....". Petitioner stipulated to Mr. Tinley's contention of value and had to put up new bond.

Reasons for Granting the Writ

Paragraph b of Rule 19 of this court provides "... or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision....". I believe this part of the rule applies here.

Nothing is more in the interest of this Republic than that the people should maintain a confidence in an impartial judiciary, which in the history of our nation, has made a substantial contribution to the growth of business in the proper adjudication of business law to the vital benefit of all people. This case presents an opportunity for the court to reassert the proper guidelines in maintaining an impartial court and justice; the judgments below need to be reversed. They are born of a natural prejudice for the defendants. No jury would have brought in this finding. I was told equity law prescribes no jury in cases between lawyer and client. Therefore, I appeal to this court for such equity in this case.

Conclusion

Mr. Raymond Pogge, my attorney in Council Bluffs for part of the process just before trial, said, "McPherson", I want you to remember one thing". "Yeh", I said, "what's that?" "Certiorari!" "What's that?", I asked. He explained it briefly. Now these attorneys can't very well make all these complaints about courts in which they practice; for instance, Mr. Sulhoff, party defendant, is now a State Court Judge in this area. Therefore, I have to make this petition in the interests of fair process, or forget it.

For these reasons, a Writ of Certiorari should issue to review the judgments and opinions of the courts below.

Respectfully submitted,

Duncan E. McPherson

Duncan E. McPherson
Pro Se.
9813 Walnut St.
Omaha, Nebraska

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

DUNCAN E. McPHERSON,	)	Civil No. 3-710-W
	)	
Plaintiff.	)	
	)	Memorandum and Order
vs.	)	
	)	
MANNING WALKER, JOHN M. PETERS, PETER J. PETERS, PAUL H. SULHOFF, WINFRED A. PHILLIPS, GRACE G. PHILLIPS, and WINFRED A. PHILLIPS d/b/a WINN PHILLIPS AGENCY,	)	
	)	
Defendants.	)	

This is an action for damages arising out of real estate transactions and a release and settlement executed in relation thereto. Jurisdiction is based on diversity of citizenship. The plaintiff is a citizen of the State of Nebraska and the defendants are citizens of the State of Iowa. The amount in controversy exceeds $10,000.

In June of 1965 the plaintiff entered into contracts with the defendants Phillips whereby the latter transferred certain interests in real estate to the plaintiff in exchange for a sum of money. The contracts provided that upon the repayment of a greater sum in six months the interests in real estate would be reconveyed to the defendants. The defendants Phillips defaulted on their contract allegations. The defendants Manning Walker, John M. Peters, Peter J. Peters and Paul H. Sulhoff are members of a law firm retained by the plaintiff to recover his investment. Manning Walker provided the legal services relating to the plaintiff's interests. In the months following Phillip's default, efforts were made by Walker and the plaintiff to recover the latter's investment. On February 3, 1966 Walker signed a release on behalf of the plaintiff which purported to discharge the Phillipses from all claims, demands and causes of action which existed by reason of the real estate transactions. Thereafter the plaintiff brought this suit claiming that the release is invalid. Division I of the Complaint prays for judgment against the defendants Phillips for all losses and expenses incurred in connection with the real estate transactions. Division II of the Complaint alleges that Manning Walker did not have authority to execute the release and prays for judgment against the defendant attorneys for all damages resulting from the execution of the release.

The release in question is unequivocal in its terms and,

if valid, bars the plaintiff's claims against the defendants Phillips. It is signed by Manning Walker as attorney-in-fact for the plaintiff. The plaintiff cannot recover if Walker had authority to execute the release or if the release has been ratified by the plaintiff. The evidence bearing upon Walker's authority includes the entire set of circumstances leading up to the signing of the release and the conduct of the parties following the signing.

Winfred A. Phillips was a real estate broker in Council Bluffs, Iowa at the times in question. In June of 1965 he received $15,000 from the plaintiff and assigned and conveyed his interest in eight parcels of real estate to the plaintiff. The transactions include a provision that Phillips would pay the plaintiff $16,500 in six months and receive back his interest in the parcels of real estate. During the six-month period Phillips continued to make and receive payments relating to the properties. The plaintiff obtained the money which he advanced to Phillips by borrowing from a bank. Phillips supplied the plaintiff with estimates of the value of the real estate together with information concerning his equity in the properties and the interests held by third parties. The plaintiff obtained appraisals of some of the properties and relied in part on the information supplied by Phillips. It appears from the record that the disclosures made by Phillips were incomplete and misleading in some instances. Notwithstanding this, the amount of the equities obtained by the plaintiff appear to have been well in excess of $16,500. The parties in this suit are in disagreement as to the nature of the transactions. Doubt exists as to whether the plaintiff obtained liens or mortgages on the properties or whether he became the owner to the extent of Phillips' equities. Shortly before or soon after it appeared that Phillips would not perform his obligations under the contract, the plaintiff

sought the assistance of defendant Walker. The plaintiff then began to exercise greater control over the properties in question. There is evidence to show that Walker felt it necessary to clarify title to the properties and provide legal authority for exercise of control by the plaintiff. To that end he obtained quit-claim deeds to the properties executed by the Phillipses in favor of the plaintiff in December of 1965. The evidence shows that Phillips was in serious financial difficulty and that his attorney was considering bankruptcy proceedings. The plaintiff and Walker were in contact with Phillips and his attorney and were aware of his financial position. Steps were taken to sell some of the properties and to protect the plaintiff's interest in others. The plaintiff had been cautious in obtaining what he considered to be adequate equities in the properties to assure protection of his investment. The evidence shows that, immediately after the default, he reasonably believed that his investment was sufficiently secure. There was little hope of receiving a substantial amount of cash from Phillips and proposals for a satisfactory settlement of the claims were made. The plaintiff, with the assistance of Walker, demanded that Phillips pay certain rents and contract payments accruing after the default and to which the plaintiff was then entitled. The plaintiff left for Florida late in January and while he remained there Walker signed the release and obtained checks from Phillips totaling $939.80. Walker testified that he discussed the terms of the release with the plaintiff over the telephone on January 27 and obtained approval to sign the release. The plaintiff returned from Florida early in February and, according to his testimony, first became aware of the release at that time. He contends that he immediately informed Walker of his disapproval of the release; that it was unauthorized; and that he would look to Walker for damages suffered as a consequence of the re-

lease. Walker contends that the plaintiff did not object to the release until months later when it became apparent that some loss would be incurred. The evidence shows that the plaintiff accepted the proceeds of the settlement and continued to deal with the property in efforts to prevent loss.

The law of Iowa is that the authority of an agent cannot be proved by the statements of the agent alone. See Hass v. Kaster, 66 N.W.2d 878 (1954). Walker's testimony in the case has been that he ad express authority to execute the release. The Court believe there is convincing evidence, both direct and circumstantial, to establish Walker's authority. The conduct of the plaintiff before and after the signing of the release, the testimony of Phillips' attorney, the evidence of the telephone call on January 27 as shown by defendants Exhibit HH, the financial condition of Phillips, and the evidence of the attorney-client relationship before and after the release all substantiate the defendants' contentions. It is the Court's conclusion that the release was executed with proper authority and that the plaintiff is, therefore, barred from recovery against any of the defendants.

The Court's finding that actual authority existed is sufficient to determine the outcome of the case. The same result would be reached by considering the evidence of the plaintiff's ratification of the release. Assuming that Walker did not have authority, the plaintiff has ratified the release by accepting the benefits of it. See Larson v. Ames Church of Christ, 213 Iowa 930, 239 N.W. 921 (1932); Ritter v. Plumb, 203 Iowa 1001, 213 N.W. 571 (1927); Fleishman v. Ver Does, 111 Iowa 322, 82 N.W. 757 (1900); Brown v. Keene, 72 Iowa 342, 33 N.W. 651 (1887). Ratification is equivalent to prior authority, Lyon County Nat. Bank v. Carsten Winter Estate, 214 Iowa 533,

242 N.W. 600 (1932), and precludes recovery from an agent, Van Every v. Crawford, 221 N.W. 914 (Iowa 1928). Having retained the proceeds of the settlement, the plaintiff has ratified the entire transaction. See Community Sav. Bank v. Gaughen, 228 Iowa 18, 289 N.W. 727 (1940); Smith v. Miller, 225 Iowa 241, 280 N.W. 493 (1938). An affirmance of an unauthorized transaction by an agent may be inferred from a failure to repudiate it. Federal Land Bank of Omaha v. Union Bank & Trust Co. of Ottumwa, 228 Iowa 205, 290 N.W. 512 (1940), reh. denied 292 N.W. 852 (1940). The plaintiff here continued to employ Walker as his attorney following the release and did not commence this suit until September 23, 1966. His actions were consistent with the defendants' contention that he objected to the release only when it became apparent that he would suffer a loss. He had sufficient knowledge of Walker's action for the Court to find that the release was ratified. See In Re. Thornhill's Estate, 233 Iowa 636, 10 N.W.2d 35 (1943). If the plaintiff did protest to Walker, such protestations accompanied by retention of the benefits do not prevent ratification. Miller v. Chatsworth Sav. Bank, 212 N.W. 722 (Iowa 1927). Under the circumstances and facts of the case the Court finds that the plaintiff would be barred from recovering by the evidence of ratification.

Accordingly, it will be ordered that the Complaint be dismissed and costs charged to the plaintiff.

IT IS ORDERED that the foregoing shall constitute the Findings of Fact, Conclusions of Law and Order for Judgment in this case. Rule 52(a) of the Federal Rules of Civil Procedure.

Dated: April 10th, 1969.

BY THE COURT:

William C. Hanson (signed)
William C. Hanson
United States District Judge

OJ7 205
Copies mailed to: Attorneys of record
Duncan McPherson
Judge Hanson

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 19,855

Duncan E. McPherson,
Appellant,
v.
Manning Walker, John M. Peters, Peter J. Peters, Paul H. Sulhoff, Winfred A. Phillips, d/b/a Winn Phillips Agency,
Appellees.

Appeal from the United States District Court for the Southern District of Iowa.

[June 30, 1970.]

Before VAN OOSTERHOUT, Chief Judge; MATTHES and GIBSON, Circuit Judges.

GIBSON, Circuit Judge.

In June 1965 the plaintiff Duncan E. McPherson of Omaha, Nebraska loaned to defendant Winfred A. Phillips, a real estate broker in Council Bluffs, Iowa, $15,000 under a written agreement whereby Phillips would pay $16,500 to the plaintiff in six months. This financial obligation, upon plaintiff's attorney's advice, was not based on a promissory note; but Phillips and his wife executed assignments of contracts and conveyances of equity interests

in five parcels of real estate, and agreed to repurchase these equities for $16,500. The plaintiff had an appraisal made of the equities agreed to be transferred and then demanded and received three additional assignments of equity interests in real estate.

Phillips failed to make the required payments called for under the repurchase agreement, as he was apparently insolvent and unable to raise additional funds. Upon default the plaintiff retained the law firm of Hess, Peters, Sulhoff and Walker to represent him in pursuing his rights under the agreement with Phillips. Defendant Manning Walker of that law firm handled the representation and assisted in liquidating some of the various equity interests assigned to the plaintiff and also handled numerous details in connection with the operation of the properties. For this purpose a power of attorney was executed by the plaintiff to Walker under date of January 6, 1966, authorizing Walker to "take possession of, manage, rent, sell or assign all interests" that plaintiff had in the property received from Phillips.

In the course of liquidating these interests, an apparent settlement with Phillips was being negotiated when the plaintiff left for Florida in January 1966. The repurchase default had occurred on December 7, 1965, and Walker, upon assuming representation of plaintiff, commenced securing legal title to the various interests and making other collection endeavors in regard thereto. At the time the plaintiff left for Florida the only unresolved issue was the amount of contract and rental payments Phillips had collected since the default date of December 7, 1965. All of these payments were claimed by the plaintiff. In a long-distance call placed by Walker to the plaintiff on or about January 27, 1966, the amount of this claim was dis-

cussed and, according to Walker, the plaintiff agreed to a settlement figure of $939.80 and authorized Walker to execute a written release to Phillips on behalf of the plaintiff. This was done under date of February 3, 1966 with Walker executing the release to Phillips as attorney-in-fact for the plaintiff. The release contained an acknowledgement of a settlement of all claims against Phillips.

After the release was executed the plaintiff continued collecting rentals and sold some of the properties assigned to him in the transaction. A detailed account stated was prepared by Walker as of April 15, 1966, which account showed receipt of the $939.80 received from Phillips along with other receipts and disbursements made in handling the properties. This account stated was accepted by plaintiff as "complete and accurate" as of April 21, 1966.

As is often the case, equities have a way of shrinking and plaintiff failed to realize the anticipated amount on this financial venture. Although plaintiff makes assertions to the contrary, the evidence indicates that he did not complain about the terms of the settlement or the release until sometime in June 1966. On September 23, 1966, plaintiff filed a *pro se* complaint in the District Court against all of the defendants seeking a declaratory judgment on the validity of the release and, depending on the determination of that issue, damages against Phillips or the law firm in the approximate amount of $22,000. In later proceedings and at the trial, plaintiff was represented by counsel. An amended complaint was filed seeking increased damages against all defendants.

In a trial to the court, the Honorable William C. Hanson presiding, the issues were found in favor of the defendants and the complaint was dismissed. The trial court

specifically found "that the release was executed with proper authority" and as an additional finding held that plaintiff had ratified the release.

In this *pro se* appeal, plaintiff challenges the sufficiency of the evidence to support the above findings, pointing out that the power of attorney did not contain an authorization to sign a release and that under the law of Iowa an attorney cannot release a client's claim. Plaintiff also contends that there was no ratification as he did not have full knowledge of all facts and circumstances concerning the release, citing *Nothem* v. *Vonderharr*, 189 Ia. 43, 175 N.W. 967 (1920).

In passing upon the sufficiency of the evidence we note that the federal and Iowa standards on sufficiency are substantially the same. *See Ozark Air Lines, Inc.* v. *Larimer*, 352 F.2d 9, 11 (8th Cir. 1965) (holding "in both [jurisdictions] there must be substantial evidence to support the verdict").

We view the evidence as clearly sufficient to support the District Court's findings and affirm the judgment entered.

The factual issue of whether or not the plaintiff authorized the execution of the release was decided by the trial court upon conflicting evidence and this finding will not be disturbed by us unless it appears to be clearly erroneous under Rule 52(b), Fed. R. Civ. P. This finding is supported by substantial evidence and is not clearly erroneous under Rule 52(b). The finding of specific authority to execute the release, though it need not be, is bolstered by the additional finding of ratification.

The plaintiff through Walker's efforts had secured legal title to the assigned property equities and had proceeded

to deal with these properties as his own. In addition to receiving the benefit of collections made in connection with the operation of the properties he received the benefit of the settlement made with Phillips.

Under Iowa law which controls in this diversity case,

> "The voluntary receipt and retention by the principal, with knowledge of the material facts, of the benefits of an act, which he would legally be entitled to repudiate, is generally viewed as a ratification of the unauthorized act of the agent, and the mere fact that the acceptance and retention of benefits, which would otherwise constitute ratification, is accompanied by protestations by the principal, does not prevent ratification." *Miller* v. *Chatsworth Savings Bank*, 203 Ia. 411, 212 N.W. 722 at 723-24 (1927).

The acceptance of benefits of the acts of persons assuming to act as one's agent ratifies the agent's acts. *Shannon* v. *Gaar*, 234 Ia. 1360, 15 N.W.2d 271, 273 (1961). The plaintiff accepted quit claim deeds from Phillips on all eight pieces of property and the $939.80 settlement payment. In addition plaintiff collected rents on the properties after the settlement date, collected $5500 on the sale of his one-half interest in one of the properties and collected a net of some $2900 on the sale of one of the other properties. Plaintiff paid off other liens and charges against these properties and we are not attempting to set forth a full account of his recoveries or his losses.

The account stated of April 15, 1966 signed by the plaintiff on April 21, 1966, some two and one-half months after the settlement, is substantial evidence of actual authority to Walker to execute the settlement on behalf of the plaintiff and is also substantial evidence of a ratification of that settlement. Under Iowa law an account stated

is prima facie evidence of the correctness of the balance shown thereon and is binding upon the parties in the absence of fraud, mistake, or error. The burden of proving fraud or mistake rests on the party seeking to do so. *Johanik* v. *Des Moines Drug Company*, 240 Ia. 310, 36 N.W.2d 370, 373 (1949). The plaintiff did not sustain that burden in this case.

The plaintiff knew Phillips was in financial straits at the time the $15,000 was advanced to him and plaintiff took the precaution of securing an independent valuation of the equities offered as security and then demanded and received additional security. The plaintiff has received and secured title to all of the various equity interests assigned to him in the transaction and apparently has collected all of the rents and contract payments made after the default date. The only right plaintiff surrendered in the release to Phillips was the right to proceed against Phillips for any loss suffered in the transaction. This right against an insolvent debtor is of dubious value at best and as a practical matter is almost worthless. Under these circumstances and considering all of the facts and circumstances of this transaction, we view the trial court's findings as not only not clearly erroneous under Rule 52(b), Fed. R. Civ. P. but fully justified by and based on substantial evidence.

Judgment affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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Supreme Court of the United States

No. 904, October Term, 1970

DUNCAN E. McPHERSON,

Petitioner,

vs.

MANNING WALKER, JOHN M. PETERS, PETER J. PETERS, PAUL H. SULHOFF, WINFRED A. PHILLIPS, GRACE G. PHILLIPS, and WINFRED A. PHILLIPS, d/b/a WINN PHILLIPS AGENCY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Supreme Court of the United States

No. ..... October Term, 1970

DUNCAN E. McPHERSON,

Petitioner,

vs.

MANNING WALKER, JOHN M. PETERS, PETER J. PETERS, PAUL H. SULHOFF, WINFRED A. PHILLIPS, GRACE G. PHILLIPS, and WINFRED A. PHILLIPS, d/b/a WINN PHILLIPS AGENCY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTION

Petitioner, Duncan E. McPherson, hereinafter referred to as McPherson, can only invoke the jurisdiction of this court under 28 U. S. C. § 1254 (1). He seeks certiorari to the United States Court of Appeals for the Eighth Circuit.

QUESTIONS PRESENTED

The District Court reached findings of fact and conclusions of law which were fatal to McPherson's claim for relief and dismissed his action. Upon appeal to the Court of Appeals, McPherson only raised the issue as to whether the evidence was sufficient to support the findings of the District Court. No complaint was made with respect to the fairness of the trial, nor was any constitutional issue propounded. The Court of Appeals determined that the findings were "fully justified by and based on substantial evidence" (Petition for Writ of Certiorari, Appendix, p. 23).

McPherson now apparently alleges that the Court of Appeals in some unspecified fashion sanctioned a departure from the accepted and usual course of judicial proceedings by the District Court. Thus he seeks to come within the last category of cases mentioned in paragraph 1 (b) of Rule 19 of the Rules of the Supreme Court. In that effort he is totally wide of the mark.

The proceedings in District Court were conducted with fairness, impartiality and decorum. McPherson was represented there by able and aggressive counsel. The evidence was against him. He lost. He was accorded a complete review by a fair and impartial panel of Court of Appeals judges. They found no error. McPherson's rights as a litigant have been scrupulously observed.

There is nothing about this case which would justify the grant of his petition for certiorari.

STATEMENT OF THE CASE

The facts are sufficiently stated in the memorandum and order of the District Court and the opinion of the Court of Appeals, both of which are set out in the Appendix (pages 11-23) made a part of the Petition for Writ of Certiorari by McPherson.

McPherson in that petition has made numerous false statements, some of which cannot be ignored:

1. McPherson claimed that one of counsel for respondents, Emmet Tinley, objected to a purported appeal bond by McPherson on the ground that the property in the litigation was not worth $250.00. Actually, McPherson simply tendered to the clerk of court a purported pledge of his equities in the properties involved in the litigation as a cost bond upon appeal to the Court of Appeals. Respondents objected that there was not a proper *surety*. The objection was sustained. McPherson still seems unaware of the distinction between "surety" and "security". He finally did file a proper cost bond on his third attempt.

2. McPherson attempted to imply that the Attorney General of Iowa in some fashion has a part in this litigation (page 6 of his Petition for Writ of Certiorari). The Attorney General had no part in any phase of this litigation or in the factual circumstances alleged to have been the basis for McPherson's claim.

3. McPherson alleges that the record is incomplete in particulars specified at the top of page 8 of his Petition for Writ of Certiorari. These allegations are totally

false. The record is complete. The supposed questions and answers exist only in McPherson's inaccurate memory.

4. McPherson attempts to create the impression that he was denied proper pre-trial discovery. To the contrary, his trial counsel conducted extensive discovery without being impeded in any respect.

5. McPherson inaccurately reports a written admonishment which he received from United States District Judge William C. Hanson (page 7 of Petition for Writ of Certiorari). Before McPherson finally retained legal counsel in the trial court he filed a motion to require Mr. Tinley and Edmund A. McGinn, attorney for Mr. and Mrs. Phillips, not to discuss the case without leave of court and a motion for default judgment together with an eight page "Brief Concerning Perjury." As a part of the memorandum and order overruling these motions the court stated:

> "The Court must again caution and admonish the plaintiff against the use of 'intemperate and unnecessary remarks' which have no proper place in the orderly administration of justice."

CONCLUSION

McPherson has been accorded justice. Every procedural protection has been extended to him, notwithstanding his unremitting personal and scandalous attacks upon litigants and counsel and now even the courts.

There is no reason for a grant of his Petition for Certiorari.

Respectfully submitted,

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Jack W. Peters

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Attorneys for Respondents, Manning Walker, John M. Peters, Peter J. Peters and Paul H. Sulhoff

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IN THE

Supreme Court of the United States

No. 904, October Term, 1970

DUNCAN E. McPHERSON,

Petitioner,

vs.

MANNING WALKER, JOHN M. PETERS, PETER J. PETERS, PAUL H. SULHOFF, WINFRED A. PHILLIPS, GRACE G. PHILLIPS, and WINFRED A. PHILLIPS, d/b/a. WINN PHILLIPS AGENCY,

Respondents.

REPLY BRIEF TO BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI

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JURISDICTION

Mr. Tinley, counsel for defendents, respondents, Walker et al, is attempting to arbitrarily limit the scope of this court's authority and jurisdiction because he fears the valid considerations of the question presented by petitioner might produce unfavorable results.

QUESTIONS PRESENTED

The attorneys for the defendents are alleging some difficulty in understanding the unusual circumstances and unusual rulings of awarding authority where such purported authority was clearly limited and where the release contract was clearly fradulent and false and then improperly applying ratification where it has been disallowed by law. All this for the benefit of an officer of the courts making the ruling.

Is this a departure from the accepted and usual course of judicial proceedings? Are these attorneys able to grasp this issue?

STATEMENT OF THE CASE

1. The allegation that petitioner has made numerous false statements is categorically denied.

Referring to respondents' paragraph No. 1 Mr. Tinley complained about the sufficiency of the $250.00 requirement. When Petitioner stipulated to Mr. Tinley's contention of value, he should have set the record straight as to what he meant. By his past conduct he has "ratified" the petitioner's contention of value less than $250.00 and he should be estopped from now trying to lie his way out of his truthful statements. Besides the property is worth less than $250.00.

2. My but they are sensitive about this. I was not sure it was even true. I heard it from someone after the trial. It appears now this little fact is true, and I can truly harbor doubts about the implications. I wish I had known about it during discovery.

3. Mr. H. Foulks, attorney for petitioner, told me he remembered talk about divorce. Mrs. McPherson appeared on the stand twice, the record shows only once. The contention of missing testimony and that Mrs. McPherson was asked about divorce by Mr. Tinley was made on appeal. By his conduct Mr. Tinley has "ratified" petitioners contention as he took no exception to it

at this time and he should be estopped from taking exception at this late date.

4. Interrogatories were served on defendent respondent Walker asking why all the evidence was not listed, such as missing power of attorney the only one executed, a purportedly, missing Statement of Account, abstracts etc., etc. They answered that the original question was general and they didn't know I wanted all the papers, or words to this effect. This paragraph of Mr. Tinleys' is a deliberate, willful and chicanerous deception.

5. McPherson accurately quoted the first admonishment; Mr. Tinley is going on here about the second admonishment.

These admonishments clearly show a biased court. Are we to believe that if this jurist were the friend of, say, Sirhan Sirhan and James E. Ray that he would tell the prosecution that no intolerant accusations would be tolerated?

All accusations made by petitioner were reasonably believed to be true and in some cases of perjury irrefutably proven true to an impartial umpire.

CONCLUSION

The plot here was that McPherson couldn't get a lawyer to prosecute this case, I couldn't either, Mr. Pogge came in late. There is no question that my style and competence at this do it your-

self job is much inferior as I am not experienced or trained in this discipline, because of this I may end up proving only that these gauche egotists will hesitate before they knife another of their clients in the back with a bunko release contract, while falsely pretending to bring the political town crook to the bar, for just cause.

Respectfully submitted,

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